Tentative Rulings for November 3, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

12CECG02787 ***Burgess Smith Development Group et al. v. Wathan et al.*** **(Dept. 502)**

16CECG03415 ***Arax v. Watershed Investments, Inc.*** **(Dept. 402)**

16CECG03335 ***Sunrise Medical v. Chris Guerra*** **(Dept. 402)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

15CECG02521 ***Kenco Investments, Inc. v. Marsh*** **is continued to Tuesday, November 15, 2016, at 3:30 p.m. in Dept. 403.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(20) **Tentative Ruling**

Re: ***Contreras v. California Department of Corrections & Rehabilitation et al.***
Superior Court Case No. 11CECG04260

Hearing Date **November 3, 2016 (Dept. 402)**

Motion: Motion for Summary Judgment

Tentative Ruling:

To grant summary judgment in favor of defendant Bernadette Garcia. To deny as to defendants Augustus Boyles and Randolph Wilson. (Code Civ. Proc. § 437c(p)(2).) Bernadette Garcia is directed to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

Explanation:

As the moving party, defendants bear the initial burden of proof to show that plaintiff cannot establish one or more elements of her causes of action or to show that there is a complete defense. (Code Civ. Proc. § 437c(p)(2).) Only after the moving party has carried this burden of proof does the burden of proof shift to the other party to show that a triable issue of one or more material facts exists – and this must be shown via specific facts and not mere allegations. (*Id.*)

> "California courts have incorporated the expert evidence requirement into their standard for summary judgment in medical malpractice cases. When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence."

(*Munro v. Regents of Univ. of Calif*. (1989) 215 Cal.App.3d 977, 984-85.)

Plaintiff does not appear to oppose the motion as to Bernadette Garcia, who never saw plaintiff for his back condition and had no professional relationship with plaintiff. (UMF 1-7.) As she had no professional dealings with plaintiff, she owed no duty.

Defendants contend the same as to Augustus Boyles, contending that plaintiff did not describe any encounter with Boyles in his deposition testimony. (UMF 12.) This fact, which defendants deem material, is disputed, as plaintiff identified "a Dr. Gus Boyle" as one of the persons who denied his healthcare request and told threatened to

write him up if he kept coming. Defendants have not shown that Boyles did not owe a duty of care to plaintiff. Additionally, plaintiff's expert, Jonathan Nissanoff concluded that since Boyles ignored plaintiff's complaints, he negligently missed several opportunities to diagnose and treat plaintiff. (Nissanoff Dec. ¶¶ 16, 17.)

Defendants rely on the declaration of expert Bruce Barnett M.D., who opined that defendant Wilson's medical practices met applicable standards of care, and that no action or inaction by Wilson caused plaintiff any harm. (UMF 21-22.)

However, the court sustains plaintiff's objection numbers 1 (as to the Twin Cities Community Hospital records only) and 4 (the Barnett Declaration), which renders the motion without evidentiary support with regards to Wilson. Even considering the custodian of records declaration submitted with the reply papers, PVSP's custodian of records cannot authenticate the records created by another entity. Thus, a portion of the medical records on which Dr. Barnett relied are not properly authenticated, rendering his onions inadmissible. (See *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735.)

Even if defendants had met their threshold burden and negated the negligence claim against Wilson, plaintiff has produced an expert declaration that creates a triable issue of fact. Dr. Johanthan Nissanoff opines that Wilson breached the standard of care by failing to examine, test or evaluate plaintiff in response to his complaints on 10/7/10. (Nissanoff Dec. ¶¶ 13-15.) Plaintiff has met his burden to raise triable issues of fact.

The court will not consider the reply declaration of Dr. Barnett. Parties moving for summary judgment may generally not file any evidence with their reply papers. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 249, 252; *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 312-313, 316.) Reply evidence is not authorized by the Code of Civil Procedure provisions governing motions for summary judgment or adjudication. (*Id.* at p. 313.)

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 11/1/16
(Judge's initials) (Date)

Tentative Rulings for Department 403

(19) **Tentative Ruling**

Re: ***Miranda v Hovannisian***
Court Case No. 15CECG01501

Hearing Date: November 3, 2016 (Department 403)

Motion: by parties for class certification and preliminary approval of class action settlement

Tentative Ruling:

To deem the case complex and order that the complex case fees be paid by November 18, 2016. To deny without prejudice, lift stay, and set date for contested certification motion on February 7, 2017.

Explanation:

1. Class Certification

i. Standards

Class certification for settlement requires the same evidence that is required for class certification when contested, but for a showing the case can be managed for trial. *Amchem Prods. Inc. v. Windsor* (1997) 521 U.S. 591. "First, the court must assess whether a class exists. This assessment "demand[s] undiluted, even heightened, attention in the settlement context." (*Id*. at 620.)

> "Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. In turn, the community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class."
>
> *In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 313.

"The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members." *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 326. See *Richmond v. Dart Industries, Inc*. (1981) 29 Cal. 3d 462, 470, holding that a ruling on certification is subject to the "substantial evidence" test. See also *Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal. App. 4th 133, 144, upholding denial of class certification because the moving party failed to present the necessary admissible

evidence in support of his motion. Accord *Bennett v. Regents of University of California* (2005) 133 Cal. App. 4th 347, 357, finding the same. And see *Carabini v. Superior Court* (1994) 26 Cal. App. 4th 239, 245: "In the absence of supporting declarations or other admissible evidence**,** indicating the communications were substantially uniform, plaintiffs have yet to establish one of the requisites for the maintenance of a class action**."**

b. Numerosity and Ascertainability

There is no proof of the size of the class. There is simply a statement from plaintiff's counsel, who can only be asserting what he learned from either a statement by defense counsel, some paper he received from defendant, deposition testimony, or discovery. This is not admissible evidence. See *Rodriguez v. County of LA* (1985) 171 Cal. App. 3d 171, 175: "Plaintiffs' petition to the superior court is completely devoid of any evidentiary support. It is made by plaintiffs' counsel, with no showing that plaintiffs' counsel had any percipient knowledge of any of the facts, or that counsel was qualified to give his opinion as an expert witness."

There is no proof supporting a claim of ascertainability. No named plaintiff has provided a declaration stating what his or her job title was. There are no discovery responses defining the job titles of those involved in remodeling, construction, repairs, or maintenance. "Ascertainability is achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible." *Sevidal v. Target Corp.* (2010) 189 Cal. App. 4th 905, 918 (internal quotations omitted). Absent some specifics based on discovery or other admissible evidence, ascertainability is not shown by describing the class as those who "worked" in certain fields of endeavor.

c. Community of Interest

"The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Medrazo v. Honda of North Hollywood* (2008) 166 Cal. App. 4th 89, 96-97.

A California court cited *Amchem, supra,* in *Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal. App. 4th 836, 851 (all internal quotations and other citations omitted):

> "In order to be deemed an adequate class representative, the class action proponent must show it has claims or defenses that are typical of the class, and it can adequately represent the class. This is part of the community of interest requirement. Where there is a conflict that goes to the very subject matter of the litigation, it will defeat a party's claim of class representative status. Thus, a finding of adequate representation will not be appropriate if the proposed class representative's interests are

> antagonistic to the remainder of the class. 'The adequacy inquiry … serves to uncover conflicts of interest between named parties and the class they seek to represent.' *Amchem Products, Inc. v. Windsor* . . .)"

No proposed class representative here provides a declaration. Their jobs are not stated, their employers are not identified, their expenses not detailed, no wage stubs are provided, and there is no evidence that they suffered any of the wrongs complained about in this action. Thus there is no way to determine if their claims are typical of those of all the other class members.

The class is to be composed of all persons involved in remodeling, repairing, construction, or maintenance work for any of the thirteen or so different defendants. There is no evidence that each of those dozen-plus defendants had a uniform policy with regard to work-related expenses, overtime, meals, rest breaks, wage statements, or payment on termination, much less any evidence that all the defendants had the same policy as each other.

In wage and hour class actions or PAGA class claims, the usual distinctive feature that permits class certification is that the employees have the same job title or perform similar jobs for the same employer, and that such employer treats all in that discrete group in the same allegedly unlawful fashion.

In *Ogbuehl v. Comcast* (E.D. Cal. 2014) 303 F.R.D. 337, 348: the Court approved settlement on behalf of this class: "[A]ll persons employed by Comcast in the State of California from February 26, 2009 through and including the implementation of the California Call Center Closure, who held positions as Virtual Customer Account Executives, and were not paid a severance payment that was offered as a result of the California Call Center Closure."

Preliminary approval was given in *Nen Thio v. Genji, LLC* (N.D. Cal. 2014) 14 F. Supp. 3d 1324, 1330: for this class: "[a]ll individuals employed within California as a Sushi Team Leader or Sushi Chef at any time from November 9, 2008 through the date of Preliminary Approval." In *Monterrubio v. Best Buy Stores* (2013) 291 F.R.D. 443, the Court certified this settlement class: "The proposed Settlement Class is defined as all persons who are, have been, or will be employed by Best Buy Stores, L.P. in the state of California from October 31, 2007, through the date of preliminary approval in a Covered Position." (ECF No. 21 at 7 n. 1.) A Covered Position is defined as 'the California Best Buy or Best Buy Mobile retail store positions of Supervisor or Manager.' "

The Court denied a motion for preliminary settlement in *Lusby v. Gamestop Inc.* (N.D Cal. 2013) 297 F.R.D. 400, 405 where the class proposed was composed of: "All persons who are and/or were employed as overtime-eligible employees by GameStop, in one or more of GameStop's California retail stores, between June 21, 2010 and June 30, 2012. Compl. ¶ 17." Why? "The Complaint does not, however, specify what job position Plaintiff held, how long he held it, what his job duties were, what his hourly rate was, or whether he is a current or former employee."

"Because it is highly unlikely that all positions and job duties at Defendants' retail stores are identical, and that all Class Members would be seeking the same relief, the Court is not persuaded that there are no dissimilarities in the proposed class that could 'impede the generation of common answers apt to drive the resolution of the litigation.' " (*Id*. at 410.)

The *Lusby* Court cited an unpublished federal case as "finding in purported class action alleging overtime claims that commonality only existed as to class members who shared the job positions actually held by the plaintiff." In *Adoma v. University of Phoenix* (E.D. Cal. 2012) 913 F. Supp. 2d 964, 971, the settlement class approved consisted exclusively of "enrollment counselors."

Certification of a class was approved in *Boyd v. Bank of America Corp.* (2014) 300 F.R.D. 431, 435. This was the class: "All California Class members who are currently employed by Defendants or were employed by Defendants at some point within the year preceding the filing of the initial Complaint in this action." That limitation to "California Class" members is the key, as they were defined as: "All persons who are or have been employed by Defendants as Appraisers, including employees with the job title 'Residential Appraiser' and any other employee performing the same or similar job duties for Defendants, within the State of California at any time from four years prior to the filing of this Complaint to the final disposition of this case." (*Id.* at 434.)

Here, there is no evidence of a uniform policy applied to the workers by any of the defendants. The record currently before the Court does not permit class certification.

2. Settlement Standards

In *Clark v. America Residential Services* (2009) 175 Cal. App. 4th 785, the Court of Appeals vacated approval of class settlement coupled with class certification, an award of $25,000 each to two named plaintiffs, and more. The problem was that the plaintiffs presented "no evidence regarding the likelihood of success on any of the 10 causes of action, or the number of unpaid overtime hours estimated to have been worked by the class, or the average hourly rate of pay, or the number of meal periods and rest periods missed, or the value of minimum wage violations, and so on." (*Id*. at 793.) That is also the situation here.

See also *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 129:

> "[I]n the final analysis it is the Court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing litigation. The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement."

"[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished . . . [therefore] the factual record must be before the . . . court must be sufficiently developed." (*Id*. at 130.)

The declaration of counsel gives some figures, but provides no foundation for them. A "sample" is discussed, but there is no declaration by an expert attesting to the statistical value of the sample, which is required to render the conclusion acceptable as admissible evidence.

The record currently before the Court does not permit proper assessment of the proposed settlement.

3. Specific Problems in this Settlement

It is not possible to determine from the papers submitted what amount of money might be paid to the class members. The amount for claims administration is uncertain; there is no cap. There is no figure assigned to the benefit to be provided to the employers out of the "class" settlement, that being payment of the employers' payroll taxes. (Settlement at 5:5-9.) It makes no sense to include payments made on the defendants' behalf as part of the "class settlement," other than perhaps to artificially increase the amount from which counsel seeks 25% in fees.

There is no evidence to support the contention that the maximum potential value is $5,300,000. Counsel claims he personally extrapolated figures from a 40 person sample, but there is no indication he is qualified to do so or how the sample was chosen or why it represents a statistically valid sample. See *Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal. App. 4th 1137, 1143, discussing *Duran v U.S. Bank National Assn.* (2014) 59 Cal. 4th 1:

> "*Duran*, a case involving a wage and hour class action, explained that sampling is a 'methodology based on inferential statistics and probability theory. The essence of the science of inferential statistics is that one may confidently draw inferences about the whole from a representative sample of the whole.' [Citation.] Whether such inferences are supportable, however, depends on how representative the sample is. '[I]nferences from the part to the whole are justified [*only*] when the sample is representative.' [Citation.] Several considerations determine whether a sample is sufficiently representative to fairly support inferences about the underlying population." (*Duran*, *supra*, at p. 38.) Those considerations include variability in the population, whether size of the sample is appropriate, whether the sample is random or infected by selection bias, and whether the margin of error in the statistical analysis is reasonable. (*Id*. at pp. 38–46.)"

There is no discussion of the types or amounts of employment-related expenses incurred. Nor is there justification for having each of the class members (who had

different job responsibilities) employed by the several different employers being grouped together, or for having their expense claims settled by reference to pay periods, which bear no relation to employment related expenses. See Settlement at 27:14 – 28:15. No pay information for any particular position to be included in the settlement is set forth, yet it appears that all are to be treated the same for settlement purposes no matter what their rate of pay. The named class representatives must set forth their rates of pay in any declarations filed for any future class certification motion or motion for preliminary approval of settlement. The named class members must also set forth exactly which of the many defendants were their employers and at what times.

The fact that the parties have not yet determined the amount of payroll periods for class members also renders the discussion of the probable value of the case lacking in foundation. See settlement at 22:23 – 23:12.

No basis is given for instructions to the class members to complete a W-9 form. (Settlement at 23:22-25.) All the workers were supposedly employees of the several defendants during the class period, thus the employers should therefore already possess such forms for prior wages paid to the employees. If they did not treat these workers as employees, then the potential claims of the class are far broader than what is alleged in the First Amended Complaint. The question of "right to control" would be more difficult to find appropriate for a class working for many different employers if employee/independent contractor status is at issue.

Settlement Administrator expenses also include tax return preparation. (Settlement at 21:22-24.) Such returns would be for the defendants/employers, not the individual workers, and is not a proper expense to be deducted from the class members' settlement.

That brings us to the release, found at 3314 – 36:23. The released parties include persons not named as defendants,[1] and is stated to include any claims which were alleged "or attempted to be alleged." The latter phrase makes no sense. The release also includes claims "known or unknown" over a several year time-period, without any additional consideration. The purported release of wrongful conduct by the defendants after the time of the preliminary approval is not appropriate, as no consideration can be determined for such future claims. See Settlement at 34:16, purporting to release claims for conduct defendants "continue to engage in . . ."

At 22:3-6 of the settlement, the parties purport to give themselves the authority to extend deadlines for the class administrator. Such authority belongs to the Court, and any extension should be sought from the Court. The attempt to give a conclusive presumption to receipt of notice found at 24:15-17 of the settlement is inappropriate. The law usually applicable in such situations is the law to be applied if an issue with notice comes up.

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[1] See settlement at 6:14-28. Released parties who are not defendants include DBH Family Limited Partnership, Bryce Hovannisian, Lindsay Hovannisian, and John Hovannisian Jr.

The requirement that the opt-outs include telephone information and complete social security number is inappropriate as it would dissuade people from opting out if they do not want to provide such detailed personal information. No phone number should be required, and the last four of any social security number should be more than sufficient for identification purposes. The names of those who have opted out must also be filed with the Court. See settlement at 25:17-20.

The provision allowing any of the many defendants to nullify the settlement if only ten person opt-out is unacceptable. Consumption of Court time and the confusion for class members inherent in such an easily avoided settlement is not justified. That provision of the settlement is found at 25:23-26.

The provision limiting disclosure of the class members' names in case of a dispute, found at 26:13-16, is inappropriate. Such persons would, if a class is certified, be clients of class counsel, and class counsel would be entitled to all information so as to be able to assist the clients.

The provision for distribution of cy pres amounts found at 29:25 – 30:4 of the settlement, or a like provision, must comport with Code of Civil Procedure section 384. The payments to the class representatives cannot be hinged on their silence about the settlement. Their discussion of same with co-workers or others assists in ensuring that the largest amount of class members are made aware of the settlement. Such can be especially important where there are multiple employers. Such provisions are found in the Settlement at 30:15-19 and 47:22-25.

The provision requiring that any objector provide information upon request by any party is not appropriate. Discovery of or by objectors need be approved by the Court. That is found at 40:9-10 of the settlement. The attempt to deem class members to have made a representation they have not assigned their claims is not appropriate, as they have made no representations in this case. See Settlement at 42:25-26.

This Court will not make a rulings on admissibility of evidence in other courts or future proceedings, and parts of the settlement to the contrary need be removed. See, e.g., settlement at 43:22 – 44:11. California law bars the parties and the Court from creating new privileges. "Courts may not create nonstatutory privileges as a matter of judicial policy." *Schnabel v. Superior Court* (1993) 5 Cal. 4th 704, 720, nt. 4. "It is clear that the privileges contained in the Evidence Code are exclusive and the courts are not free to create new privileges as a matter of judicial policy." *Valley Bank v. Superior Court* (1975) 15 Cal. 3d 652, 656.

The Court will not approve the provision calling for absent class members to pay attorneys' fees if there is a dispute. That is found at 44:13-18. Such provision has no benefit to class members, who are represented by class counsel here, and such could be finally devastating to an hourly construction, maintenance, etc. worker.

The provision calling for certain rules to be applied to interpretation of the agreement (Settlement at 48:6-13) need be removed. The Court will follow the usual rules of contract interpretation if such issues arise.

The inclusion of the McCormick Barstow attorney as one to be given notice is unnecessary, as he was substituted out of this case. That occurred on November 20, 2015.

Because of the problems above, and especially because of the proposal to pay taxes owed by defendants out of the settlement, the notice to the class does not inform them of what they be gaining in return for giving up their claims.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 11/1/16
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Ramirez v. Doe***
Court Case No. 16CECG01021

Hearing Date: **November 3, 2016 (Dept. 403)**

Motion: Plaintiffs' Motion for Leave to File Second Amended Complaint

Tentative Ruling:

To continue the hearing to Tuesday, December 6, 2016, to allow plaintiff Andres Ramirez to file a declaration explaining the discrepancies of fact at issue on this motion, and for plaintiffs to provide a revised proposed Second Amended Complaint which addresses *both* discrepancies at issue (i.e., as to the date *and* the MRI). New allegations/language must be set in **boldface** type.

The declaration must be filed on or before November 10, 2016. Defendants may file opposition to this declaration on or before November 18, 2016. Plaintiffs may file a reply to opposition on or before November 28, 2016.

Ruling on evidentiary objections: Objection Nos. 1, 5, 7, 8, 9, 10, 12, 13, 14, 15, 16, and 17 are overruled; Objection Nos. 2, 3, 4, 6, and 11 are sustained.

Explanation:

Judicial policy favors resolution of cases on the merits, and thus the court's discretion as to allowing amendments will usually be exercised in favor of permitting amendments. This policy is so strong, that denial of a request to amend is rarely justified, particularly where, as here, "the motion to amend is timely made and the granting of the motion will not prejudice the opposing party." (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530, 343 P.2d 62, 64.)

However, a fact stated in a pleading is considered a "judicial admission," which must be conclusively deemed true against the pleader unless the party is permitted to amend the pleading. (*Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1155—finding that "the trial court may not ignore a judicial admission in a pleading, but must conclusively deem it true as against the pleader.") Unverified pleadings are subject to this rule, as well as verified pleadings. (*Reichert v. General Ins. Co. of America* (1968) 68 Cal.2d 822, 836.)

Thus, under the "sham pleading doctrine," the court's discretion in permitting amendments to avoid a judicial admission is substantially limited. "As a general rule a party will not be allowed to file an amendment contradicting an admission made in his original pleadings. If it be proper in any case, it must be upon *very satisfactory evidence that the party has been deceived or misled*, or *that his pleading was put in under a clear mistake as to the facts*." (*Id.* at p. 1158 (emphasis in the original), quoting *Brown v. Aguilar* (1927) 202 Cal. 143, 149. *American Advertising & Sales Co. v. Mid-*

Western Transport (1984) 152 Cal.App.3d 875, 879—Amendment will not be allowed without "very satisfactory evidence" clearly showing "that the earlier pleading is the result of mistake or inadvertence.") Absent such evidence, the court must deny leave to amend. (*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 945; *State ex rel. Metz v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402, 412.)

Mr. Arjang's Declaration on Reply:

Mr. Arjang filed a Reply declaration attempting to deal with the two facts that are at odds with the current pleading. This is generally not allowed. (*Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010.) However, the court has discretion to consider new evidence in reply, as long as it gives the opposing party opportunity to respond. (*Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1307–1308.) The court has considered the declaration, and the opportunity to respond will be extended to defendants. The court has considered the inadmissible statements as an offer of proof as to what Mr. Ramirez would testify to if given the opportunity, which he will be given. Allowing Mr. Ramirez this opportunity is in keeping with the policy of liberally allowing amendment to pleadings, as well as the fact that the doctrine against sham pleadings is not intended to prevent honest complainants from correcting erroneous mistakes, but rather to prevent an abuse of process. (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 426.)

Taken as a whole, and depending on what Mr. Ramirez' testimony actually is *and the credibility of that testimony*, there may be enough admissible evidence to find that plaintiffs are not attempting sham pleading, such that amendment should be allowed. If the discrepancies in the pleading were simply mistakes, there is no prejudice to defendants in allowing the amendment.

Counsel can state his reliance on the police report to allege the date of the incident and what body part the MRI concerned, and his lack of knowledge about this until August 2016. His statements as to contacting two employees of defendant have been considered for their nonhearsay purpose of showing that plaintiff's counsel has done some due diligence in investigating his client's story. After all, counsel had just learned his client was clearly wrong about *the date* and *the body part involved in the MRI*. This investigation was thus a reasonable act, i.e., to attempt to independently verify other facts set forth by his client. This information at least corroborates the possible existence of an employee named Carlos at the business where plaintiff says the incident took place, who allegedly matches the description Mr. Ramirez gave to the police. Counsel may also testify to his plan to take the detective's deposition and to seek his help in finding Carlos Doe. All of these statements tend to establish that the attorney drafted the complaint and First Amended Complaint according to what his client (and the police report) told him, and this motion represents his good faith belief that his client just made an error on two facts stated in the complaint.

In the context of a motion to amend, counsel may also state his opinion as to defendant's knowledge of the discrepancy between the facts and the allegations, and what he supposes defense counsel's strategy is in not stipulating to the

amendment (in ¶¶ 1, 8, and 15). California Rules of Court, Rule 3.1324, requires a declaration to accompany the motion which specifies: "(1) the effect of the amendment; (2) why the amendment is necessary and proper; (3) when the facts giving rise to the amended allegations were discovered; and (4) The reasons why the request for amendment was not made earlier." To address these issues, this Rule necessarily requires the moving party (***or*** his/her counsel) to offer his/her opinion and make some legal conclusions. (See Cal. Prac. Guide Civ. Pro. Before Trial Ch. 6-E, §6:677—advising that the required declaration is "usually by counsel for the moving party.") These statements seek to provide a basis for exercise of the court's discretion in allowing amendment.

However, Mr. Arjang cannot testify that his client was "inadvertently mistaken about the date of the incident," or that he merely "guesstimated" that the incident had taken place about two weeks prior to the time of his report. He cannot state that his client could not remember the exact date, or that he did not know what was written in the police report. He cannot state that when his client visited the facility on March 26, 2015 he "was under the impression" he would be getting an MRI of his ankle (i.e., not his hip).

Also, he cannot establish via the Grant Deed for the property that this is the "location of the incident." While a recorded copy of the deed might arguably be admissible or subject to judicial notice, it cannot be used to establish where the incident took place, nor can counsel testify to that fact.

Declaration from Mr. Ramirez is needed:

Plaintiffs' counsel's original declaration was insufficient to establish that the discrepancies of fact between the current pleading and the proposed amended pleading were due to "a clear mistake as to facts," and in fact did not deal at all with the discrepancy as to the MRI being of Mr. Ramirez' hip and not his ankle. *Both* of these facts must be dealt with before the court can determine if amendment should be allowed. Mr. Arjang's reply declaration is sufficient to establish that he is proceeding in a good faith belief that his client merely made a mistake as to these two facts, and that the current pleading was prepared based on what he believed were the facts. But it is insufficient to provide "very satisfactory evidence" that it was indeed a mistake. (*Thurman v. Bayshore Transit Management, Inc., supra,* 203 Cal.App.4th at p. 1158.)

This evidence must be provided directly from Mr. Ramirez. However, he is cautioned that the job of the court is to assess his credibility in determining whether the initial facts were mere mistakes; a self-serving declaration that does not explain why or how such errors occurred will not suffice. (*American Advertising & Sales Co. v. Mid-Western Transport*, *supra,* 152 Cal.App.3d at p. 879—Credibility is for trial court to determine; court must decide whether pleader "was playing fast and loose with the truth in this case.") "The absence or presence of good faith on the part of the moving party certainly bears on the exercise of the court's discretion in granting or denying leave to file an amended complaint, especially one which constitutes an about-face from the position originally taken by the plaintiff and steadfastly maintained through law and motion and discovery proceedings." (*Id.* at p. 879-880.)

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 11/2/16
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Garcia v. Salazar, et al.***
Court Case No. 14 CECG 01391

Hearing Date: November 3, 2016 (Dept. 403)

Motion: Plaintiff's Motion to Tax Costs

Tentative Ruling:

To grant and tax the sum of $29,892.00.

Explanation:

The "very essence" of section 998 is its encouragement of settlement. (*Scott Co. of California v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1114; *Mangano v. Verity, Inc*. (2008) 167 Cal.App.4th 944, 950.) Thus, "to encourage both the making and the acceptance of reasonable settlement offers, a losing defendant whose settlement offer exceeds the judgment is treated for purposes of postoffer costs as if it were the prevailing party." (*Scott Co. v. Blount, Inc*., *supra*, 20 Cal.4th at p. 1114.)

Plaintiff claims that defendant is 1) not entitled to costs because he made only a token offer which was not made in good faith; 2) she failed to itemize the expert's time and rates; and 3) she failed to attach the 998 offer to the Memorandum of Costs.

Good Faith of the Offer

"The purpose of section 998 is to encourage the settlement of litigation without trial. [Citation.] To effectuate the purpose of the statute, a section 998 offer must be made in good faith to be valid. [Citation.] Good faith requires that the pretrial offer of settlement be 'realistically reasonable under the circumstances of the particular case....' [Citation.] The offer 'must carry with it some reasonable prospect of acceptance. [Citation.]' [Citation.]" (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262.)

Whether the offer is reasonable "depends upon the information available to the parties as of the date the offer was served." (*Westamercia Bank v. MBG Industries, Inc*. (2007) 158 Cal.App.4th 109, 130.) Reasonableness generally "is measured, first, by determining whether the offer represents a reasonable prediction of the amount of money, if any, defendant would have to pay plaintiff following a trial, discounted by an appropriate factor for receipt of money by plaintiff before trial, all premised upon information that was known or reasonably should have been known to the defendant," and "[i]f an experienced attorney or judge, standing in defendant's shoes, would place the prediction within a range of reasonably possible results, the prediction is reasonable." (*Elrod v. Oregon Cummins Diesel, Inc*. (1987) 195 Cal.App.3d 692, 699, italics and fn. omitted.)

First Test:

The offer easily passes the first test. "Where ... the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable and the offeror is eligible for costs as specified in section 998." (*Santantonio v. Westinghouse Broadcasting Co*. (1994) 25 Cal.App.4th 102, 117 (*Santantonio*).)

Second Test:

"If the offer is found reasonable by the first test, it must then satisfy a second test: whether defendant's information was known or reasonably should have been known to plaintiff. This second test is necessary because the section 998 mechanism works only where the offeree has reason to know the offer is a reasonable one. If the offeree has no reason to know the offer is reasonable, then the offeree cannot be expected to accept the offer." (*Elrod v. Oregon Cummins Diesel, Inc*., *supra*, 195 Cal.App.3d at p. 699.)

Plaintiff argues that the $30,000 offer was a "token offer." Specifically, plaintiff states he had incurred over $100,000.00 in medical expenses as a result of the accident and had surgery.

Nevertheless, cases finding offer "token offers" made in bad faith are far lower than $30,000. (See *Pineda v. Los Angeles Turf Club, Inc*. (1980) 112 Cal.App.3d 53 (*Pineda*) [$2,500 offer]; *Wear v. Calderon* (1981) 121 Cal.App.3d 818 (*Wear*) [$1]; *Culbertson v. R.D. Werner Co., Inc*. (1987) 190 Cal.App.3d 704 [$5,000]; *Elrod v. Oregon Cummins Diesel, Inc*., supra, 195 Cal.App.3d 692 [$15,001].) For example, *Wear*, *supra*, 121 Cal.App.3d 818 and *Pineda*, *supra*, (1980) 112 Cal.App.3d 53, are credited with establishing the requirement that a section 998 settlement offer must be reasonable and in good faith to support an award of expert witness fees. In applying these general principles, however, subsequent cases have repeatedly emphasized the specific facts in each case may lead to a different conclusion. (See, e.g., *Essex Ins. Co. v. Heck* (2010) 186 Cal. App. 4th 1513, 1529; *People ex rel. Lockyer v. Fremont General Corp.* (2001) 89 Cal.App.4th 1260, 1272–1273; Jones, supra, 63 Cal.App.4th at p. 1263; *Culbertson v. R.D. Werner Co., Inc*., *supra*, 190 Cal.App.3d 704, 708–710.)

Similarly, the facts here are readily distinguishable from those in *Wear* and *Pineda*. In *Wear*, the Court of Appeal reversed an award of expert witness fees because it found a nominal $1 settlement offer lacked good faith when compared to the plaintiff's $18,500 in damages. (*Wear*, supra, 121 Cal.App.3d at p. 821.) In *Pineda*, the Court of Appeal affirmed the trial court's conclusion a $2,500 settlement offer was a token offer when compared to the $10 million the plaintiffs sought. (*Pineda*, supra, 112 Cal.App.3d at pp. 62–63.) Both courts stressed that they based their decision on "the circumstances of the particular case." (*Wear*, at p. 821; *Pineda*, at p. 63.)

However, in *Santantonio*, *supra*, (1994) 25 Cal.App.4th 102, the Court of Appeal found the trial court did not abuse its discretion when it awarded expert witness fees based on a $100,000 settlement offer, despite the plaintiff's claim of more than $900,000

in economic damages: "[T]he mere fact that [plaintiff] claimed projected economic losses of over $900,000 does not mean that defendants' $100,000 offer was unreasonable or unrealistic. Defendants contended that they had no liability to [plaintiff] at all, and the jury ultimately agreed. Moreover, defendants contended that the damage estimates by plaintiffs' expert were greatly excessive...." (*Id*. at p. 118.) *Santantonio* is readily analogous to this case. (See also *Adams v. Ford Motor Co*. (2011) 199 Cal.App.4th 1475, 1484–1486.)

Plaintiff makes essentially the same argument as the plaintiffs in *Santantonio*: his damages were too high. He also makes the same mistake as the *Adams* plaintiffs; he fails to provide a reasoned analysis of his prospects for success based on what he knew at the time of the 998 offer, May 27, 2016. It is the offeree, in this case, the plaintiff, which bears the burden of proving that offer was unreasonable and the offeror is not eligible for costs. (*Elrod v. Oregon Cummins Diesel, Inc*., *supra*, 195 Cal.App.3d at p. 700.) Plaintiff has not met that burden and an award of expert fees is appropriate.

A. Motion to Tax — Generally

Items of allowable costs are set forth in Code of Civil Procedure section 1033.5, subdivision (a), and disallowed costs are set forth in subdivision (b). Items not expressly mentioned in the statute "upon application may be allowed or denied in the court's discretion." (Code Civ. Proc. § 1033.5, subd. (c)(4).) All allowable costs must be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation, and they must be reasonable in amount and actually incurred. (Code Civ. Proc. § 1033.5, subd. (c)(1), (2) and (3).)

On motion to tax costs, the initial burden depends on the nature of the costs that are being challenged. "If the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that they were not reasonable or necessary. On the other hand, if the items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs." (*Ladas v. Calif. State Auto. Assn*. (1993) 19 Cal.App.4th 761, 774.) "The court's first determination, therefore, is whether the statute expressly allows the particular item, and whether it appears proper on its face. If so, the burden is on the objecting party to show them to be unnecessary or unreasonable." (*Ibid*.) In order to meet this burden, where the objections are based on factual matters, the motion should be supported by a declaration. (*County of Kern v. Ginn* (1983) 146 Cal.App.3d 1107, 1113-4.)

B. All Experts

Plaintiff asserts that all expert fees must be denied because the Memorandum of Costs worksheet was not filled out properly as it failed to list the hours billed by the expert and the hourly rate of the expert. Also, plaintiff claims that the failure to attach the actual section 998 offer invalidates the request for expert fees, citing *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 538.

Again, on objection to an item of costs, the court first determines whether the costs are statutorily allowed and whether they appear proper on their face. (*Ladas v.*

Calif. State Auto. Assn., *supra*, 19 Cal.App.4th at p. 774.) Because there was a valid 998 offer for more than the verdict in favor of plaintiff, expert fees are awardable. Thus the costs are statutorily allowed. (Code Civ. Proc., § 1033.5, subd. (b)(1) [Fees of experts not ordered by the court, except when expressly authorized by law].) There is nothing improper about the costs on their face. Moreover, to the extent that plaintiff objects that he cannot calculate the reasonableness of the experts' time and rates, defendant has produced the relevant information and invoices with her opposition. Thus, there is no longer any controversy, and to deny the motion on this ground would elevate form over substance.

With respect to *Behr v. Redmond*, *supra*, 193 Cal.App.4th 517, the case did reverse the award of expert fees where a plaintiff failed to "support her memorandum of costs with a written offer to compromise." However, that issue was unopposed on appeal and it is not stated in the opinion whether the parties contested any aspect of the 998 offer. Here, plaintiff admits receiving the offer in the amount of $30,000. (Motion 5:22-26.) Thus, to allow her to circumvent the fee shifting provisions of section 998 for defendant's failure to staple a document already in plaintiff's possession to the Memorandum of Costs – an act no statute or court rule requires, would be meaningless.

The court will not tax all the expert fees.

C. Dr. Steven Rothman

In her opposition, defendant reduced her claimed costs for her experts to only that time incurred after the 998 offer was served. She seeks $5,450 for Dr. Rothman. Plaintiff presents no facts in any declaration why Dr. Rothman's testimony was not reasonably necessary to the defense, nor why his rate of $650 per hour is not reasonable for one with his training and experience. Accordingly, there is no reason to tax Dr. Rothman's fees.

D. Dr. Donald Huene

Defendant now seeks only $4,000 for Dr. Huene. Dr. Huene's testimony was critical to defendant's presentation of defendant's position that plaintiff did not sustain a significant injury in the accident. (Gates Decl. ¶ 6.) Plaintiff presents no facts in any declaration as to why Dr. Huene's testimony and assistance was not reasonably necessary to the defense or why his rate of $500 per hour is not reasonable for one with his training and experience. Accordingly, there is no reason to tax Dr. Huene's fees.

E. Larry Stewart

Defendant seeks $625 for the services of Larry Stewart, who was retained to view the *sub rosa* video tapes to comment on the "important topic of plaintiff's movements." Counsel declares this analysis was extremely beneficial to the defense. (Gates Decl. ¶ 7.) Plaintiff's counsel declares: "I deposed him and he stated on the record that he had no opinions to offer in the case and that his sole function was to watch the *sub rosa* video and note when Plaintiff did or did not wear a back brace." Based on these descriptions, it appears that the services rendered by Mr. Stewart were nonetheless

reasonably necessary. Someone had to watch the *sub rosa* tape and be prepared to testify about its contents. It is reasonably necessary to use a consultant for this task.

Mr. Stewart failed to testify at trial. Testimony at trial is not required for recovery of an expert witnesses' fees. Section 998 states that fees for expert witnesses "actually incurred and reasonably necessary in ... preparation for trial" are recoverable. (§ 998, subd. (c)(1).) Although the statute refers to expert witnesses, courts have recognized that "section 998 ... covers the cost of experts who aid in the preparation of the case for trial, even if they do not actually testify." (*Santantonio v. Westinghouse Broadcasting Co.*, *supra*, 25 Cal.App.4th at p. 124.)

The court will not tax Mr. Stewart's fees.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 11/2/16
(Judge's initials) (Date)

Tentative Rulings for Department 501

(19) **Tentative Ruling**

Re: ***Miller v. Cocal California, Inc.***
Court Case No. 14CECG02313

Hearing Date: **November 3, 2016 (Department 501)**

Motion: by parties for class certification and preliminary approval of class action settlement

Tentative Ruling:

To deny the instant motion without prejudice, and set a case management conference for December 13, 2016 at 3:30 p.m. To also order defendant to pay complex case fees by November 15, 2016, with credit for $435 payment made on October 10, 2014.

Explanation:

1. Class Certification

ii. Standards

Class certification for settlement requires the same evidence that is required for class certification when contested, but for a showing the case can be managed for trial. *Amchem Prods. Inc. v. Windsor* (1997) 521 U.S. 591. First, the court must assess whether a class exists. This assessment "demand[s] undiluted, even heightened, attention in the settlement context." (Id. at 620.)

> "Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. In turn, the community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class."
>
> *In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 313.

b. Numerosity and Ascertainability

There is no proof of the size of the class.

The class definition set forth at 4:19 – 5:2 of the settlement is uncertain, as it includes "all employees" in a certain time period "relating to any and all facts asserted in the Action or any other claims that could have been asserted . . . including but not limited to . . ." "Ascertainability is achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible." *Sevidal v. Target Corp*. (2010) 189 Cal. App. 4th 905, 918 (internal quotations omitted). One cannot limit a class to only those who have claims. The Court discusses below the types of classes usually presented for certification in wage and hour matters.

c. Community of Interest

"The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Medrazo v. Honda* (2008) 166 Cal. App. 4th 89, 96-97. Neither proposed class representative here provides a declaration. Their jobs are not stated, no wage stubs are provided, and there is no evidence that they suffered any of the wrongs complained about in this action. Thus there is no way to determine if their claims are typical of those of all the other class members.

The class is to be composed of all "non-exempt" employees of any kind, and to include any kind of wrong that resulted in non-payment of overtime, minimum wages, missed meal periods and rest breaks, any sort of paystub irregularity, payment by debit cards, and reimbursement for shoes. It is difficult to see how such a class would be proper. No evidence of any company policy is provided, although class counsel contends that such policies exist. The proof discussed by paragraph 34 of counsel's declaration must actually be placed before the Court before certification for settlement can occur.

In wage and hour class actions or PAGA class claims, the usual distinctive feature that permits class certification is that the employees have the same job title or perform similar jobs, and the employer treats all in that discrete group in the same allegedly unlawful fashion.

In *Vasquez v. Coast Valley Roofing, Inc*. (E.D. Cal. 2010) 266 F.R.D. 482, the Court gave preliminary approval of a settlement class seeking PAGA penalties, where "the proposed class is comprised of all individuals who have been employed by Coast in California as non-exempt roofing workers during the period from January 31, 2003 to July 31, 2009." (Id. at 486.)

In *Ogbuehl v. Comcast* (E.D. Cal. 2014) 303 F.R.D. 337, 348, the Court approved a PAGA settlement on behalf of this class: "[A]ll persons employed by Comcast in the State of California from February 26, 2009 through and including the implementation of the California Call Center Closure, who held positions as Virtual Customer Account Executives, and were not paid a severance payment that was offered as a result of the California Call Center Closure."

Preliminary approval was given in *Nen Thio v. Genji, LLC* (N.D. Cal. 2014) 14 F. Supp. 3d 1324, 1330: for a PAGA claim by this class: "[a]ll individuals employed within California as a Sushi Team Leader or Sushi Chef at any time from November 9, 2008 through the date of Preliminary Approval." In *Monterrubio v. Best Buy Stores* (2013) 291 F.R.D. 443, the Court certified this settlement class for PAGA penalties: "The proposed Settlement Class is defined as all persons who are, have been, or will be employed by Best Buy Stores, L.P. in the state of California from October 31, 2007, through the date of preliminary approval in a Covered Position." A Covered Position was defined as 'the California Best Buy or Best Buy Mobile retail store positions of Supervisor or Manager.' "

The Court denied a motion for preliminary settlement in *Lusby v. Gamestop* Inc. (N.D Cal. 2013) 297 F.R.D. 400, 405, where the class proposed was composed of: "All persons who are and/or were employed as overtime-eligible employees by GameStop, in one or more of GameStop's California retail stores, between June 21, 2010 and June 30, 2012. Compl. ¶ 17." Why? "The Complaint does not, however, specify what job position Plaintiff held, how long he held it, what his job duties were, what his hourly rate was, or whether he is a current or former employee."

"Because it is highly unlikely that all positions and job duties at Defendants' retail stores are identical, and that all Class Members would be seeking the same relief, the Court is not persuaded that there are no dissimilarities in the proposed class that could 'impede the generation of common answers apt to drive the resolution of the litigation.' " (Id. at 410.)

The Lusby Court cited an unpublished federal case as "finding in purported class action alleging overtime claims that commonality only existed as to class members who shared the job positions actually held by the plaintiff." In *Adoma v. University of Phoenix* (E.D. Cal. 2012) 913 F. Supp. 2d 964, 971, the settlement class approved for a PAGA settlement consisted exclusively of "enrollment counselors."

Certification of a class for recovery of PAGA penalties was approved in *Boyd v. Bank of America Corp.* (2014) 300 F.R.D. 431, 435. This was the class: "All California Class members who are currently employed by Defendants or were employed by Defendants at some point within the year preceding the filing of the initial Complaint in this action."

That limitation to "California Class" members is the key, as they were defined as: "All persons who are or have been employed by Defendants as Appraisers, including employees with the job title 'Residential Appraiser' and any other employee performing the same or similar job duties for Defendants, within the State of California at any time from four years prior to the filing of this Complaint to the final disposition of this case." (Id. at 434.)

The record currently before the Court does not permit class certification.

2. Settlement Standards

In *Clark v. America Residential Services* (2009) 175 Cal. App. 4th 785, the Court of Appeals vacated approval of class settlement coupled with class certification, an award of $25,000 each to two named plaintiffs, and more. The problem was that the plaintiffs presented "no evidence regarding the likelihood of success on any of the 10 causes of action, or the number of unpaid overtime hours estimated to have been worked by the class, or the average hourly rate of pay, or the number of meal periods and rest periods missed, or the value of minimum wage violations, and so on." (Id. at 793.) That is also the situation here.

See also *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 129: "[I]n the final analysis it is the Court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing litigation. The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement."

"[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished . . . [therefore] the factual record must be before the . . . court must be sufficiently developed." (Id. at 130.)

The declaration of counsel gives some figures, but provides no foundation for them. A "sample" is discussed, but there is no declaration by an expert attesting to the statistical value of the sample, especially where a class of every kind of employee is to be included, so long as paid an hourly wage.

The record currently before the Court does not permit the required assessment of the proposed settlement.

3. Specific Problems in this Settlement

The "settlement period" is defined on page 5:3-4 as "from August 8, 2010 through Preliminary Approval," but the First Addendum calls for dismissal of claims through the final approval. The value of such unknown claims is not set forth, nor is any basis for assessing the additional claims discussed. The settlement also calls for release of all unknown claims, without additional consideration or evidence of what such claims for a company's entire hourly workforce might include in terms of wages, unreimbursed expenses, and related matters.

Because the class itself is so broad, and the description of wrongs so general, the release itself suffers from overbreadth. It is difficult to determine what claim that might involve wages which would not be released. Usually a class action sets forth specific alleged wrongs, such as failure to pay class members for putting on and taking off

protective equipment, refusal to allow meal periods due to a specific policy such as being "on call" and having to answer the phone during meals (or rest breaks). Here, the only specific conduct by defendant described is the "Shoes for Crews" and the debt card allegations.

The settlement calls for dismissal at 7:5. That is not permitted. See California Rules of Court, Rule 3.769(h): "If the court approves the settlement agreement after the final approval hearing, the court must make and enter judgment. The judgment must include a provision for the retention of the court's jurisdiction over the parties to enforce the terms of the judgment. The court may not enter an order dismissing the action at the same time as, or after, entry of judgment."

There need be a declaration from the proposed claims administrator as to its qualifications and the adequacy of the proposed fees. There also need be a limit, as the provision authorizing an unlimited amount to come from the settlement will not be approved. See the stipulation at 11:3-5.

The parties cannot make an agreement as to how the stipulation will be treated in other cases. See *Baker v. General Motors Corp* (1998) 522 U.S. 222. The problem language is found at 8:5-9 an 8:26-28 of the stipulation. The law makes provisions for when settlement matters are admissible, and a disclaimer of liability is sufficient. See Evidence Code section 1152.

The provision concernomg publicity is problematical. Publicity can provide notice to potential class members who are cannot be located and allow them to obtain funds which might be due them. A secrecy agreement would detract from wide notice. The provision that class counsel are allowed to make a "limited disclosure to the Court" is inappropriate and will not be approved. The Court has a fiduciary duty to class members, as does class counsel. Complete candor is required.

The stipulation calls for dissemination of class members' Social Security Numbers to an unknown company for skip tracing. Such company need be named, and the settlement need have protective measures on use of such number by such entities.

The declaration to be provided to counsel by the class administrator (stipulation at 13:7) need also be filed with the Court. The Court will be the sole judge of whether an objection will be considered. Responses to objections must be served on the objector as well as filed with the Court.

Code of Civil Procedure section 384 provides for the treatment of unclaimed funds in class actions; the provisions in the stipulation at 17:18 and 4:18-20 of the First Addendum to Stipulation must be changed to conform to the law. A signed copy of any addendum is required if a future motion is made.

The provision providing for jurisdiction in San Mateo Superior Court need be stricken. That is found at 21:13-17. This is also true of the confidentiality provision found at 22:8-12; the Court will not approve language treating unknown material as

confidential as part of the settlement to be entered as judgment. No evidence is presented to support a claim that documents are confidential.

The Notice to Class requires certain information for opt-outs to be valid, such as the last four digits of the Social Security Number and execution under penalty of perjury. Yet the forms provided for such purposes do not include such information, rendering them automatically invalid. There is no requirement that an opt-out be under penalty of perjury in any case the objection form requires only that it be mailed to the administrator; it also need be filed with this Court.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 11/1/16
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***LloydWinter, P.C. v. Colonial First Lending Group, Inc.***

Case No. 15CECG01061

Hearing Date: November 3, 2016 (Dept. 501)

Motion: By C. Casey Little and Brad McOmie for Attorney's Fees.

Tentative Ruling:

To grant the motion for attorney's fees. The Court awards reasonable attorney's fees of $7,000 and costs of $870.00.

Explanation:

Moving parties C. Casey Little and Brad McOmie seek $22,665.25 in attorney's fees and costs of $870.00 for successfully opposing Plaintiff LloydWinter, P.C.'s motion to amend a default judgment to name them under an alter ego theory.

Attorney's fees on a contract, such as here, are governed by Civil Code §1717.

Section 1717 states, in pertinent part:

> In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Courts have held that, where a non-party defeats a motion that would have bound it to paying attorney's fees, the non-party can recover attorney's fees for that motion. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128.)

Plaintiff attempts to distinguish *Reynolds Metals* on the grounds that the pertinent individuals actually "defendant an action on a contract," as opposed to merely defending against a single motion. (Opposition at p. 4.) Although this is true, the *Reynolds Metals* case did not rest its decision on this premise. Rather, *Reynolds Metals* was concerned with whether the moving parties were entitled to reciprocity; if they were at risk of incurring attorney's fees if they had lost, then they are entitled to attorney's fees if they win. (*Reynolds Metals, supra*, 26 Cal.3d at 128.)

Plaintiff then argues that moving parties are not entitled to attorney's fees because Plaintiff (as a law firm) was not entitled to attorney's fees for pursuing its own case. However, this is not the law: the fact that a person chooses to represent themselves does not negate the other party's right to obtain attorney's fees should it choose differently. No case law can be found to support Plaintiff's position.

The Court notes that Plaintiff has conceded that the award of attorney's fees as part of the default judgment was incorrect as a matter of law and is not seeking satisfaction of the judgment for such fees.

Finally, Plaintiff argues that there should be no attorney's fees because the moving parties did not prevail on an action pursuant to a contract. As moving parties note, the great weight of case law is to the contrary. (*See, e.g., Reynolds, supra,* 25 Cal.3d at 128-29; *Pueblo Radiology Medical Group, Inc. v. Gerlach* (2008) 163 Cal.App.4th 826, 829.)

In short, the moving parties were prevailing parties for purposes of the motion between them; had they lost the motion, they would have been subject to liability for attorney's fees had Plaintiff chosen to engage outside counsel at any point. Therefore, they are entitled to attorney's fees under Civil Code §1717.

When awarding attorney's fees pursuant to Civil Code §1717, the Court has broad discretion in determining the amount and, even, whether to award any attorney's fees. (*Hill v. Affirmed Housing Group* (2014) 226 Cal.App.4th 1192, 1196.) A court will usually use the "lodestar" method to determine the reasonable attorney's fees which is calculated by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate. (*Roos v. Honeywell Int'l, Inc.* (2015) 241 Cal.4th 1472, 1494-95.) "The experienced trial judge is the best judge of the value of professional services rendered in [] court. . . and will not be disturbed unless the appellate court is convinced that it is clearly wrong." (PLCM Group v. Drexler (2000) 22 Cal.4th 1084, 1095.)

In determining the reasonable hourly rate, the trial court uses the "hourly prevailing rate for private attorneys in the community conducting non-contingent litigation of the same type," which is also defined as the "hourly amount to which attorneys of like skill in the area would typically be entitled." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133.) Here, moving parties have asked for an hourly rate of $425 per hour for each of the attorneys who have done work on this case, advising that this is discounted from their usual rates of $595 per hour. In support of the $425 per hour figure, they provide three declarations submitted in other cases-one in federal court and two in this superior court- and one Fresno Superior Court order. The declarations are not persuasive authority and the Court order awarded fees pursuant to a complex class action law suit. Based on the Court's experience, a fee of $350 per hour is the reasonable hourly rate for attorneys of Mr. Little and Mr. Stillman's experience in this community.

The opposition to the motion was ten pages in length, and included a declaration of Casey Little and evidentiary objections. There was no hearing in the

matter. The total number of hours for the motion, as such, is approximately 17 hours.. Furthermore, the attorneys seek compensation for over ten hours on the present motion. In total, for this case, the attorneys are seeking compensation for approximately 39.8 hours of work. The motion filed by Plaintiffs was relatively straight forward and did not require the amount of work dedicated to it. Reviewing the documents and papers on file with this motion, roughly half the amount of time charged would have been reasonable.

Therefore the Court finds that 20 hours of work on the two motions would have been a reasonable amount of time to spend on the motion, at a reasonable hourly rate of $350. This would provide a value of $7,000.00.

Finally, moving parties seek costs of $870.00 for the filing fees for Mr. McOmie and Mr. Little. This appears to be reasonable.

Therefore, the Court awards attorney's fees of $7,000.00 and costs of $870.00.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 11/2/16
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Ali v. Asurea Insurance Services***
Court Case No. 16CECG02443

Hearing Date: **November 3, 2016 (Dept. 501)**

Motion: 1) Defendant Asurea Insurance Services' Motion to Vacate Default
2) Defendant Asurea Insurance Services' Demurrer to complaint

Tentative Ruling:

To grant the motion to vacate default, and continue the demurrer to allow plaintiff to oppose it on its merits. Hearing on demurrer is continued to Wednesday, November 23, 2016, in Department 501, with opposition due on or before November 10, 2016, and reply due on or before November 16, 2016.

Explanation:

Defendant was served with process on August 5, 2016. Due to the holiday on September 5, 2016, defendant had until close of business on September 6, 2016, to file its responsive pleading. This means plaintiff could not attempt default until, at the earliest, September 7, 2016. Plaintiff presented her Request for Entry of Default to the clerk on August 6, 2016, and it was entered on September 9, 2016. There are several reasons this default must be set aside.

First, the request for default was presented prematurely, and the clerk's general practice is to consider default *as of the date presented*, which fact would itself call for denial of entry of default, even if the clerk did not process it until after that date. In other words, had the clerk processed the default on the date presented, it would have been denied. As such, the default was entered erroneously by the clerk.

Second, defense counsel has presented a sufficient basis to find excusable error for why the demurrer was not filed on September 6, 2016, the date he intended it to be filed. Code of Civil Procedure section 473, subdivision (b) provides for relief from default where defendant or its attorney presents evidence that there was a mistake as to some fact material to the defendant's duty to respond, and due to this mistake defendant failed to make a timely response. (*Lieberman v. Aetna Ins. Co.* (1967) 249 Cal.App.2d 515, 523–524; *Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1604; *Hu v. Fang* (2002) 104 Cal.App.4th 61, 64.)

Third, considering the clerk's default on its face (regardless of the error noted above) defendant's responsive pleading (its demurrer) was on file prior to entry of the default: the motion was filed on October 7, 2016, and default was entered as of October 9, 2016.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this

ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 11/2/16
(Judge's initials) (Date)

Tentative Rulings for Department 502

(29) **Tentative Ruling**

Re: ***Cheryl Juels v. Florencio Rivera Sandoval, et al.***
Case No. 14CECG02458
Terracon Consultants, Inc. v. Florencio Rivera Sandoval, et al.
Case No. 16CECG02244

Hearing Date: **November 3, 2016 (Dept. 502)**

Motion: Consolidate

Tentative Ruling:

To deny the motion to consolidate case numbers 14CECG02458 and 16CECG02244, without prejudice. (CRC, rule 3.350(a)(1).)

Explanation:

California Rules of Court, rule 3.350(a)(1) requires that notice of a motion to consolidate be filed in each case sought to be consolidated.

In the case at bench, the moving party failed to file notice of the instant motion in case number 16CECG02244. Accordingly, the motion is denied without prejudice.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 11/2/16
(Judge's initials) (Date)

(30)

Tentative Ruling

Re: ***Kassandra Clemente v. Good Cents Pest Control, Inc.***
Superior Court Case No. 15CECG02507

Hearing Date: Thursday November 3, 2016 (**Dept. 502**)

Motion: Petition to Compromise a Minor's Claim

Tentative Ruling:
To deny the petition, without prejudice. *Petitioner must file an amended petition, and obtain a new hearing date for consideration of the amended petition*. (Super. Ct. Fresno County, Local Rules, rule 2.8.4.)

Explanation:
The petition contains the following discrepancies and omissions:

1. Diagnosis
Box 9 (a) indicates minor is fully recovered, but medical records do not substantiate this claim. (Petition, attach 9.) On March 14, 2014, treating doctor indicated that minor *may* require future treatments. (*Ibid*, notes from 3/14/14.) This Court requires evidence of minor's *present* condition.

2. Policy Limits
Coparties received significantly more than minor: Olivia Retamoza $85,000; Kassandra Clemente $75,000. (Petition, ¶ 12 (5).) Attachment 12 indicates that policy limits were not considered in minor's settlement and that minor's award is based on her relatively limited injuries. However, due to the vast disparity, This Court requires policy limit information and the accident report.

3. Medical Bills
Box 13 indicates that medical expenses total $348. However, medical bill must be provided to verify this amount.

4. Attorney's Fees
In attachment 14a, Attorney Paul Grossman requests 25% of minor's net settlement, which equates to $979.09 *roughly* two and one half hours. (see Petition, attach 18a, ¶ 5(b)(ii).) He states that he performed intake, investigation, assisted with medical treatment, limited litigation, and settlement. (Petition, attach 14a, ¶¶ 4, 5.) But Attorney Grossman does not provide billable hours related to the case or specific to minor's claim, and he has already received $45,287.08 from coparties. (Petition, box 18 (c).) This equates to 113 hours, which is more than enough to settle all claims related to this case, especially since this "case did not involve difficult questions of law" and Attorney Grossman has 40 years' experience. (*Id.* at attach 14a, ¶¶ 6(a), 2.) Without proof that Attorney Grossman expended time specific to minor's claim, no fees can be awarded.

5. Order

Box 5(b) of the proposed order must state the date that minor will turn 18.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 11/2/16

(Judge's initials) (Date)

Tentative Rulings for Department 503